IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND.

VIRGINIA RAILWAY AND POWER COMPANY *v.* THE JITNEY ASSOCIATION, INC.; THE RICHMOND JITNEY 'BUS COMPANY, INC.

April 23, 1915.

Municipal Corporations—Use of Streets by Jitney Buses—Consent of City.—A jitney bus association, engaged in carrying passengers along the streets of a city in auto cars, does not make use of the streets in a way similar to the use made of the streets by the various enterprises designated in § 124 of the Constitution, and in clause 1 of § 1294-b and clause 1 of § 1294-i of the Code, and they do not come within the purview of the constitutional or legislative provisions requiring them to obtain the consent of the municipal authorities before running vehicles along the streets of the city.

On motion for injunction.

Henry W. Anderson, E. Randolph Williams and *Andrew Christian, Jr.*, attorneys for plaintiff.

Richard Evelyn Byrd, D. C. O'Flaherty, Christopher B. Garnett and *Royall E. Cabell*, attorneys for defendant.

OPINION.

CRUMPS, Judge: The question upon which the right of the complainant corporation to the injunction prayed for in this case is based, is a narrow one and turns upon the construction of a section of the Virginia constitution and of corresponding language in our statutes.

The complainant is a street railway company, which operates within the limits of the city of Richmond a modern electric street railway enterprise. The defendants are to be taken for the purposes of this motion, to be engaged in carrying citizens along the streets of the city from point to point in auto cars either of the ordinary size and character or of a larger size similar to an omnibus such vehicles being generally known as jitney 'buses.

The complainant street car company bases its motion for an injunction on the ground that the defendants are common carriers, and as such are conducting an enterprise similar in that respect to the operation of the street car company, and they are forbidden by section 124 of the constitution from engaging in such an enterprise upon the streets of the city of Richmond without having first obtained the consent of the corporate authorities of the city.

Section 124 of the constitution is in the following language.

"No street railway, gas, water, steam, or electric heating, electric light or power, cold storage, compressed air, viaduct, conduit, telephone or bridge company, nor any corporation, association, person or partnership, engaged in these or like enterprises, shall be permitted to use the streets, alleys or public grounds of a city or town without the previous consent of the corporate authorities of such city or town."

This section has no reference to the control of such enterprises by the public authorities, either under the police power or the power of taxation, as the exercise of public control in these two respects over every character of public service corporation is provided for in article 12 of the constitution, on corporations, and article 13, on taxation and finance. Section 124 is one of the sections of article 8 of the constitution, entitled "Organization and Government of Cities and Towns." The language of the section in question, therefore, has no reference to the control of a municipal corporation over any of the occupations mentioned in said section, but the language of the section, considering its location and context, has plainly for its object solely the regulation of the power of municipal corporation in respect to the use of its streets as public highways. Upon reading the following section 125 this, I think, becomes perfectly apparent:

Construing section 124 in view of these considerations, I think that without considering other portions of the constitution and our statutory legislation, it is manifest that the words "like enterprises" are not to be taken to mean any occupation or business similar to any one of the several occupations or enterprises specified. The main object manifestly had in mind by the draftsman of this section was the use of the streets, and the several classes of business in general requiring the rendering of public service are mentioned because, although as a business or enterprise, they are entirely unlike, still in the prosecution of their work they have a common attribute; that is, they require the use of the public streets, or of alleys and parks. Like enterprises mean enterprises or any occupation engaged in by a corporation or a person rendering a character of public service which requires, in order that its operations may be carried on, the use of the streets, alleys or public grounds in a manner which is unlike the use to which they are put by, or which is permitted, to the public at large. All of the dozen or more occupations specified require in their operations or work the use of the streets and alleys of the city in a way different from that in which it is used by ordinary vehicles. It is well known how a street car company uses a street, how a gas or water company or electric power or telephone company uses the streets, and the enterprises coming within the purview of the language "like enterprises" are enter-

prises or classes of business which use the streets in a manner similar to those named.

Although the defendants may be for purposes of taxation and public control or under the police power, classed as common carriers, still so far as the use of the streets is concerned, their vehicles do not use the streets in a manner differing from other vehicles of a like character. If they use them to a greater extent, it may call for a regulation of their operation by the corporate authorities, but it does not justify the courts in restraining their right to carry on their business. In my opinion the proper interpretation to be put upon the section of the constitution in question is that it was intended to declare that no corporation or person engaged in a business involving the rendering of service to the public, and requiring the actual occupancy of a public street in a city, with its tracks or conduits, poles or wires, or in any other way, shall be allowed so to use the streets without the consent of the municipal authorities.

Upon a review of the legislation enacted by the legislature which met in July, 1902, in order to provide a legislation carrying out the provisions of the new constitution, these views are confirmed. In the portion of the code of 1904, relating to municipal corporations, the objects of section 124 of the constitution is carried into effect in sections 1033-d and 1033-e. Clause 1 of section 1294-b is in the following language:

"1. No public service corporation, cold storage, compressed air, viaduct, conduit, or bridge company, nor any corporation, association, person, or partnership, engaged in these or like enterprises, shall use, cross, or occupy with its works the streets or alleys, public or private, or the public grounds, of any incorporated city or town, whether along, over or under the same, without the consent of the corporate authorities thereof; and in case any person shall be damaged in his property by any such use, occupation, or crossing, such corporation, association, person, or partnership shall, before using, crossing, or occupying such streets, alleys, or public grounds, make compensation therefor to the person so damaged."

This section uses the language "use, cross, or occupy with its works," thus placing upon record a legislative construction of the language of the constitution.

Section 1294-1 of the Code, clauses 1 and 3, which are a part of the original act concerning public service corporations, confer upon the companies and persons mentioned in section 124 of the constitution, full power to use the highways in counties, and streets and alleys in the cities, for the purpose of carrying on their work.

Without reviewing in detail the language and purport of the foregoing legislation, I am satisfied that it shows that it was pre-

pared and enacted upon the assumption that the constitutional policy was to preserve to the citizens of the state the free use of the streets and highways for travel, both as a matter of pleasure and of business, and to prohibit the occupancy of any part of the highways by persons or corporations engaged in any business, without the consent of the municipal authorities, either corporate or county, being first obtained. The streets of a city under well recognized principles in Virginia differ in no way from public highways generally, and a citizen of Russell county has the same right to the use of a street in the city of Richmond as a public highway as has a citizen of the city. The construction placed by the legislature which met in 1902 upon the constitution is entitled to exceptional consideration. In McCurdy *v.* Smith, 107 Virginia. 757. the court says:

"By sections 19 and 20 of the schedule of the constitution the legislature of December, 1901, was called in extra session July 15, 1902, for the express purpose of enacting such laws as might be deemed proper, 'including those necessary to put this constitution into complete operation.' The members of that body possessed exceptional opportunities for ascertaining the true intent and meaning of the constitution, and their enactments constitute contemporaneous construction of more than ordinary value."

My conclusion is that inasmuch as the defendants in running their vehicles on the streets of Richmond do not make use of the streets in a way similar to the use made of the streets by the various enterprises designated in section 124 of the constitution, and in clause 1, of section 1294-b and clause 1 of section 1294-i of the code of Virginia, they do not come within the purview either of the constitutional or legislative provisions requiring them to obtain the consent of the municipal authorities before running vehicles along the streets of the city. If by reason of the more continual and constant use of the streets and of the number of motor vehicles, the general public is incommoded or inconvenienced in the ordinary use of the streets, to which the citizens of the state are entitled, this is a matter that calls for regulation by the municipal authorities and is not sufficient to call into action the judicial department of the government.

The motion for an injunction, therefore, should be denied.

Note.

The rapid development of the "jitney bus" movement throughout the country makes the question presented one of general interest. It is interesting to note that the opinion of the lower court has been practically affirmed by the Supreme Court of Appeals of Virginia:

The injunction being denied by Judge Crump, under § 3435 of the Code of Virginia as amended (Acts 1908, p. 36) application for an

injunction was made to Keith, President, and Cardwell, Judge, of the Supreme Court of Appeals, sitting together and after hearing argument by counsel on both sides, the application was likewise refused by the two Judges named, the Judges making the following memorandum on the back of the decree of the Law and Equity Court, refusing the injunction:

"An application for an injunction having been made by the plaintiff in this cause to the Honorable Beverley T. Crump, Judge of the Law and Equity Court of the City of Richmond, and the same by him refused, an application was this day made to the undersigned Judges of the Supreme Court of Appeals of Virginia, who being of opinion that the defendants, The Jitney Association, Inc., and The Richmond Jitney Bus Company, Inc., are not engaged in the conduct of a like enterprise with that carried on by the plaintiff, the Virginia Railway and Power Company, within the meaning of § 124 of the Constitution of the State of Virginia, the prayer for an injunction is denied.

JAMES KEITH,
R. H. CARDWELL."

April 23rd, 1915.